No. 13246

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

APPELLANT'S CLOSING BRIEF.

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I.

The Authorities Cited by the Appellant Are Directed to Specific Orders and to the Doctrine of Assumption of Risk Which Is Not an Issue in This Case.

The case of *Republic Iron and Steel Co. v. Berkes,* 70 N. E. 815, relied on by appellee (Appellee's Reply Brief, p. 9) is clearly distinguishable from our case for several reasons. That case involved an order *directing the particular way* in which the work was to be done. The plaintiff in that case had no time to reflect upon the manner of doing the work. Finally, the decision by the Court is a finding as a matter of law on the particular facts and does not approve the language used in appellee's in-

struction number 23 as a proper instruction to be given to a jury.

The quotation from 16 Cal. Jur., page 1070 (Appellee's Reply Brief, pp. 11 and 12) and cases cited thereunder are assumption of risk cases and do not deal with the issue of contributory negligence. They stand for the legal proposition that the employee is entitled to assume that the master has exercised reasonable care to furnish a reasonably safe *place* to work or a safe tool.

Price v. Northern Electric Co., 168 Cal. 173, 142 Pac. 91 (Appellee's Reply Brief, p. 12), holds that the employee is not guilty of negligence as a mater of law because he obeyed instructions to work on an unsafe bent and the work was rushed.

Petersen v. California Cotton Mills Co., 20 Cal. App. 751, 130 Pac. 169 (Appellee's Reply Brief, p. 12), holds that it was not error to charge the jury that in considering the degree of care exercised by the servant the fact that servant was acting under orders might be taken into account, and that the fact he had been ordered into a position of danger is an element to consider in determining whether he exercised ordinary care.

II.

The Jury Was Erroneously Instructed That an Employee Following an Implied Order Could Assume He Would Not Be Hurt.

See instruction number 23 (Appellee's Reply Brief, p. 21).

Appellee had a choice between getting aboard the car within sight of other members of the crew—the safe way—or on the opposite side of the train. He chose to board the car on the opposite side from the crew. (See *Schwind v. Floriston Pulp & Paper Co.,* 5 Cal. App. 197, 89 Pac. 1060 (choice between safe and unsafe way).) Assuming that appellee was permitted to board the car, nowhere does the record disclose that he was permitted by the foreman to board the car *on the opposite side* of the train. By so doing he disregarded the long established custom of working on the engineer's side of the train where signals were being passed, and where his lantern could be seen at all times. [See Foreman Mahan's testimony at pages R. 288, 297, 308, and 322-4, and Trainmaster Wilson's testimony, R. 340.] Moreover, appellee should have known the engine foreman was going to couple into the car. [R. 289.] Appellee's activities raised a jury question as to whether he exercised ordinary care for his own safety. Instruction number 23 excused any possible negligence on his part.

Appellee argues at page 15 of his brief that the jury was instructed that the railroad does not insure its employees against accidents. Instruction number 23, however, raised a conflict with this instruction and provided an exception to it. Instruction number 23 entitled the jury to find that if appellee was following the order of his foreman and was not warned or notified that in so

doing he would be injured, he was entitled to assume he would not be hurt regardless of his own activity, whether negligent or not, and regardless of whether or not the implied order was general or specific or given in the exercise of reasonable care by the engine foreman.

In the instant case the implied order permitted appellee to get aboard the car for the purpose of inspecting the brakes was, at most, a *general order.* The *manner* in which appellee carried out an implied general order raised the issue of contributory negligence, a question which the jury should have been permitted to determine.

See the following authorities:

56 C. J. S. page 1307, Master and Servant, Section 467:

> "A servant must exercise ordinary care in obeying the command or orders of the master, or of a superior, in order to be relieved of the charge of contributory negligence." (See footnotes 13 and 14.)

39 C. J., page 899, Master and Servant, Section 1123 (The manner of carrying out the order rather than the mere fact the servant obeyed it may be the cause of the injury, footnote 91.)

Nichols v. Oregon-Washington R. and Nav. Co. (Wash., 1922), 206 Pac. 939 (Holding that the general rule is that a servant who, while obeying a master's orders, was injured because of some act of negligence on his part, which is in no wise the proximate result of the order, cannot rely on the master's order to relieve him of the effects of his own negligence. "The driver was told what to do—not how to do it," p. 940.)

This case quotes from Labatt, *Master and Servant,* (2nd Ed., Sec. 1368) to the effect that the servant is not relieved of the charge of contributory negligence where he is hurt by the negligent manner in which he executes a general order, provided he was not ordered to pursue a particular course of conduct.

Conclusion.

Appellant submits that instruction number 23 made appellant absolutely liable for any injury sustained by appellee in following the foreman's implied order, thus insuring his safety and denying to appellant the benefit of any reduction in damages because of any contributory negligence which the jury was entitled to consider concerning the manner in which appellee carried out any implied order.

Respectfully submitted,

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